

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1390

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

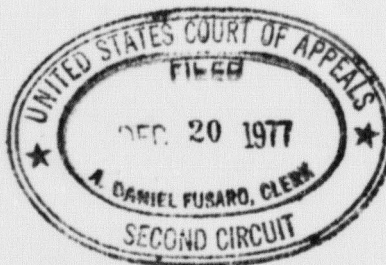
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UNITED STATES OF AMERICA, X
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Appellee, X
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- v - X
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HUGO GOMEZ, X
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Appellant. X
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Docket No. 77-1390

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P/S

BRIEF FOR APPELLANT HUGO GOMEZ

Appeal from a Judgment
of Conviction in the
United States District
Court for the Southern
District of New York



Raphael H. Beauduy, Esq.
Attorney for Appellant
11 Broadway
New York, New York 10004

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,	X	
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Appellee	X	
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HUGO GOMEZ,	X	
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Appellant.	X	
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BRIEF FOR APPELLANT HUGO GOMEZ

Hugo Gomez appeals from his conviction of July 21, 1977 in the United States District Court for the Southern District of New York (Duffy, J.) upon an adverse jury verdict on one count of conspiring to import cocaine, and a second count of possessing it with intent to distribute. 21 U.S.C. 812, 841. He received a sentence not to exceed fifteen years on both counts 1 and 2 to run concurrently. The sentences, however, were to be served consecutively with the 15 year sentence imposed by Judge Burns of Portland, Oregon. Three other defendants, Moreno, Arroyo and Rayo were tried and convicted and are also parties to this appeal.

The evidence of the Government, if believed, was that a crewman of a Colombian cargo ship berthed in San Francisco about January, 1976 dropped a bundle over the side containing narcotics and it was alleged the bundle was retrieved by swimmers and the

narcotics brought to a motel in San Francisco and apportioned out to the defendants. The case of the Government rested entirely on the credibility of one Emilio Rivas who admitted, during the course of the trial, to having lied under oath at various times and on diverse occasions; also that he had been a narcotics dealer in Brooklyn for a long period of time. The venue laid in the Southern District of New York was based on the alleged sale in New York of cocaine supposedly received in San Francisco in January, 1976 although this was not clearly proved.

Since the jury took three days to decide this case it is logical to suppose that it was a close case even though the defendant Gomez did not testify nor did any of the others. However, counsel believes there were errors.

QUESTIONS PRESENTED

1. Did the District Court err in permitting the jury to consider alleged similar acts in Portland, Oregon eleven months after the alleged conspiracy in San Francisco?

2. Did the District Court err in refusing to charge the jury that the evidence of association by the defendant Gomez with the other defendants was not sufficient to constitute an active participation in a conspiracy?

STATEMENT OF THE CASE

Defendant Hugo Gomez comes from Cali, Columbia, South America not from Buenaventura, Columbia where the other defendants came from. On February 19, 1976 the Government witness, Emilio Rivas, was arrested in New York while attempting to sell a quantity of cocaine to a Drug Enforcement Agent (399).* He offered to cooperate with the Government (467). He said he got his narcotics from a person called Charlie (467, 475). He said he had been introduced to Charlie by Carmen Vivas, that he had met Charlie in a dance hall and had received the cocaine from Charlie in a meat market in New York. That Charlie had complained that he had drugs to sell but no one to sell to (473). At the Government agent's request Rivas wore a recording device to use in a meeting with Charlie (470).

Rivas later pleaded guilty to a Southern District indictment based on the sale of cocaine to the agent (445). Carmen Vivas was also indicted. On his plea of guilty in Judge Werker's court he claimed the drugs had come from Charlie (492) giving the same story to the United States Attorney, his own attorney and to the Probation Department (493). After Judge

* Numbered references, without more, are to the trial transcript. "A" denotes the Appendix to Appellants' Briefs.

Werker had imposed a twenty year sentence (498) Rivas decided to state that the cocaine had come from the defendants in San Francisco from a Columbian ship. His altered story was now as follows:

In September, 1975 Rivas stated he went to San Francisco with a friend to pick up some cocaine from a Columbian ship (229). There he met defendants Moreno (241) and Rayo (245). In late January, 1976 Rivas stated he heard from Moreno that a ship was expected in San Francisco (272). Defendant Gomez was also in San Francisco at that time. The ship arrived and a member of the crew told some of the defendants he had the cocaine (336). Rayo and Arroyo were to swim out, pick up the cocaine, bring it to shore. Rivas received one and a half kilo that he brought to New York (382) and sold some to various persons and a kilo to the Government agent in Manhattan who arrested him. (399)

Indictment and Trial

In February, 1977 the Government indicted Moreno, Gomez, Arroyo and Rayo for the January, 1976 pickup in San Francisco. Count One (A21) charged a conspiracy to violate the narcotics laws from December, 1975 to February 19, 1976, the day of Rivas' arrest. The sale by Rivas in the Southern District of New York to a Government agent was the basis for the venue in the Southern

District (Overt Act 8, A24). Count Two charged the sale as an unlawful distribution (A24 - 25). The case against Ahon- Casquete was dismissed at the close of the Government's case. The member of the crew above referred to was never arrested and neither was the companion of Gomez (371).

In spite of the long criminal record of the Government's chief witness, Emilio Rivas, and his past record of lying on many and varied occasions under oath, the jury apparently believed his testimony as to the conspiracy. The Court refused a request for a specific instruction as to whether the cocaine sold by Rivas in New York was the same as that received by him in San Francisco in January, 1976 (A79 - 80).

The jury was deliberating for approximately three days. Eventually they returned guilty verdicts on both counts against all four defendants who are appealing.

ARGUMENT

POINT 1

THE JURY SHOULD NOT HAVE BEEN PERMITTED
TO CONSIDER THE PORTLAND, OREGON SIMILAR
ACTS.

Evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character provided that its potential for prejudicing the defendant does not outweigh its probative value. United States v. Vosper 493 F. 2d 433 (1974). Use of subsequent similar acts must be used sparingly. D. C. Conference on proposed rules of evidence.

The testimony referring to the Portland incident took place some eleven months after the alleged conspiracy of January, 1976. It was objected to (1751). Similar acts are admissible only if in close temporal proximity with the acts charged in the indictment. United States v. Chestnut, 533 F 2d 40, 50 (2d Cir. 1976); United States v. Gallo 543 F 2d 361.

The acts which took place in Portland, Oregon and admitted into evidence in this trial are acts which were so remote in time that it prevented defendant Gomez from having a fair trial. Evidence of other criminal activity can hardly be disassociated from besmirching the character of the person. What better way to attack a person's character than to point out that he was involved in

other criminal acts or activities. United States v. Taglione 546 F. 2d at 199; United States v. Kaufman 453 F. 2d 306, 311.

Another reason that this testimony regarding the Portland incident should have been excluded was that in and of itself it was not incriminating. That testimony was that the Government agent broke down the door into the motel room without permission and found the defendant Hugo Gomez fully clothed and standing in the room without more. The testimony was that there was a so-called wet suit (which indeed was not wet) nearby in another portion of the room. The evidence is that Gomez did not hire the room (1830) and that the wet suit was not his (1871). If this bespeaks criminality we are going very far.

The admission of this evidence and the refusal to exclude same prevented the defendant Gomez, in a practical sense, from taking the stand as to the San Francisco incident because it would have been raked up to his prejudice.

POINT 11

THE DISTRICT COURT ERRED IN REFUSING A
REQUEST TO CHARGE THAT THE EVIDENCE LINKING
DEFENDANT GOMEZ TO THE CONSPIRACY WAS
INSUFFICIENT, MERE ASSOCIATION NOT BEING
ENOUGH.

There was insufficient proof of participation by defendant Gomez in the over all conspiracy charge. The extracts from the record detailed below show a mere association with the other

defendants and does not show any active participation in the activities of the alleged conspiracy. There was no proof that he was involved in any agreement or that he had any knowledge of any agreement to import cocaine. Rivas testified that Gomez was with a friend and yet he did not state the name of the friend nor was the friend ever arrested (371). People v. Tramunti, 513 F. 2d 1087. As the court said in People v. Tramunti Supra in determining whether any defendant was a party (to a conspiracy), each is entitled to individual consideration of the proof respecting him or her, including any evidence of his or her knowledge or lack of knowledge, his or her status, his or her participation in key conversation, his or her participation in the plan, scheme, or arrangements alleged. I submit that there was insufficient proof of participation in the conspiracy. Extracts above mentioned are Pages 329, 335, 336, 337, 338, 339, 341, 342, 370, 371, 373, 1825 and 1826. It is common knowledge that a person who happens to be in a group may not know anything about the criminal plans of others in the group. Guilt by association is not adequate proof. United States v. Papadakis, 510 F. 2d 289, 294.

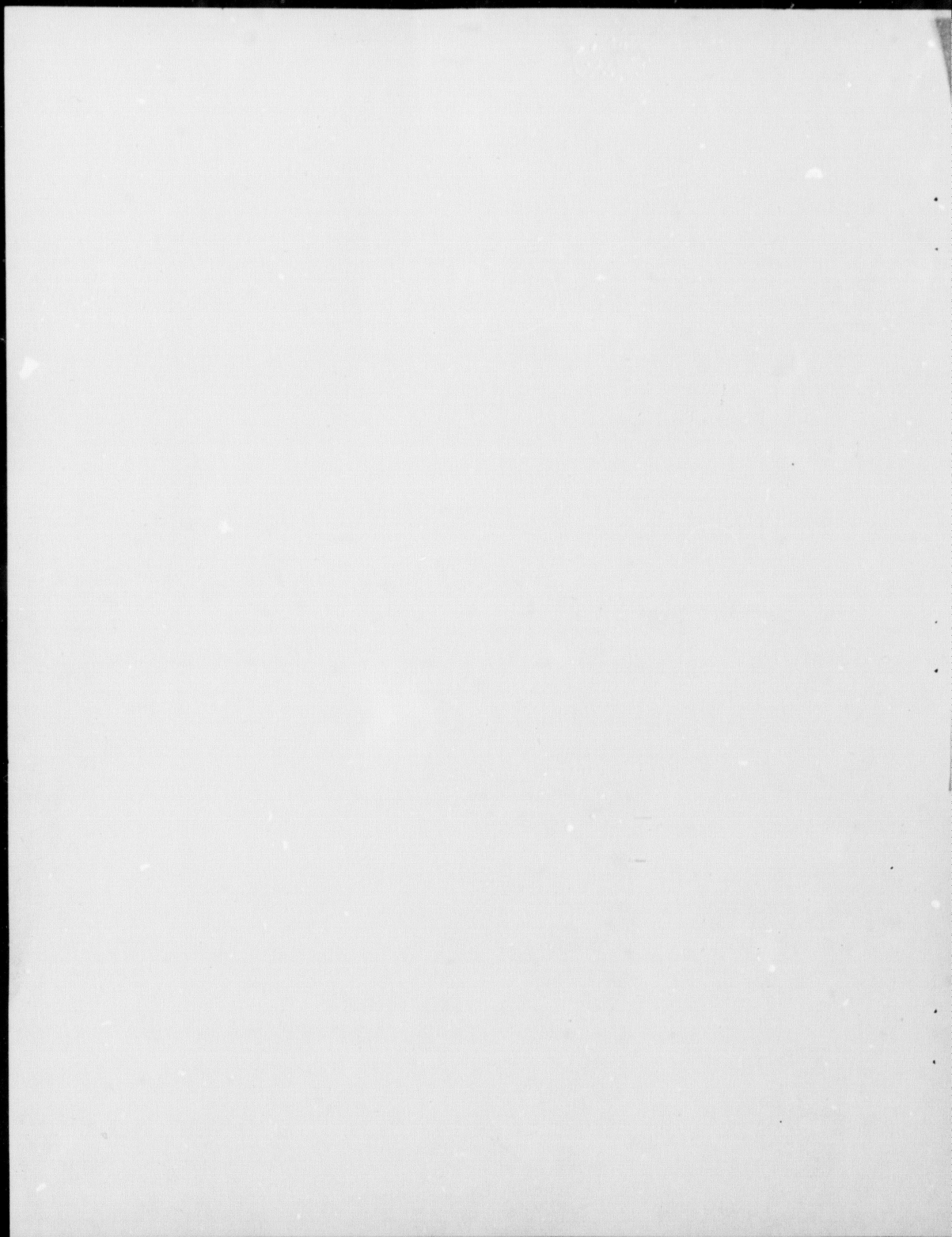
CONCLUSION

In view of the foregoing it is respectfully submitted that the conviction below should be reversed and defendant Hugo Gomez granted a new trial.

Dated: New York, New York
December 16, 1977

Respectfully submitted,

RAPHAEL H. BEAUDUY, Esq.
Attorney for Appellant
Hugo Gomez
Office and P. O. Address
11 Broadway
New York, New York 10004



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

Docket No. 77-1390

UNITED STATES OF AMERICA,

Appellee,

~~XXXXXXXXXX~~

against

HUGO GOMEZ,

Appellant.

~~XXXXXXXXXX~~

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action is over 18 years of age and resides at

Joan M. Beck
315 Rudyard St.
S. I., N.Y. 10306

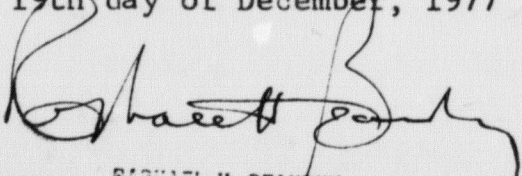
That on December 19, 19 77 deponent served the annexed

on
attorney(s) for
in this action at

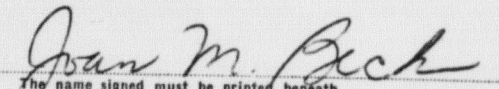
BRIEF FOR APPELLANT HUGO GOMEZ
Constance Cushman, Esq.
United States Attorney
One St. Andrews Plaza, New York, New York 10007

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~XXXXXX~~ official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this
19th day of December, 1977



SAMUEL H. BEAUVY
Notary Public, State of New York
No. 00 223000
Qualified in Nassau County
Cwt. filed in New York County
Term Expires March 30, 1978


The name signed must be printed beneath
Joan M. Beck